2007 WL 5476728 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Maryland.

FUTURECARE-LOCHEARN, INC, Plaintiff/Counter-Defendants,
v.
BEULAH ADDISON ET AL, Defendants/Counter-Plaintiffs.

No. 24-C-06-010429.
August 7, 2007.

Beulah Addison's Opposition to Plantiff Futurecare-Lochearn's Motion to Compel Arbitration of Counter-Claims, Motion to Stay, and Request for Attorney's Fees & Request for Hearing

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COMES NOW Defendant and Counter Plaintiff, Beulah Addison (hereafter “Ms. Addison”), by her attorneys Julianne Chappell and CHAPPELL LAW, LLC, and Phillip Robinson, Michael Morin, and CIVIL JUSTICE, INC., and opposes Plaintiff Lochearn Nursing Home, LLC d/b/a FutureCare-Lochearn, Inc.'s (“FutureCare”) Motion to Compel Arbitration of Counterclaims, Motion to Stay, and Requests for Attorney's Fees, (“Motion”) and states:

RELEVANT FACTS

1. FutureCare has sued Addison for nonpayment of charges for nursing home or related services.
2. Ms. Addison has defended the suit against her for nonpayment and has counter- claimed for various tort causes of actions.

3. The parties to this civil action are parties to a Arbitration Agreement that is limited to claims “... that arise out of, or relate to any safety issues, professional service or health care provided by the facility, it agents, servants and/or employees ...” Additionally, the Arbitration Agreement specifically excludes issues involving payment of fees.

4. The Arbitration Agreement was forced upon Ms. Addison while she was in the process of being admitted to the FutureCare facility due to having suffered a major stroke. She was not in any condition to evaluate or understand the documents thrust upon her and she was given no opportunity to seek any assistance let alone legal advice.

5. Neither Ms. Addison, nor her agents or attorneys, have ever been given a copy of the Arbitration Agreement until FutureCare filed the instant Motion. Despite numerous requests for copies of all alleged contracts and agreements between the parties, FutureCare stonewalled Ms. Addison and her attorneys until they were forced to provide copies of the requested documents as an attachment to their belated Motion to Compel Arbitration.

6. No claim asserted by Ms. Addison arises out of or relates to any “safety issue.”

7. No claim asserted by Ms. Addison arises out of or relates to “health care.”

8. No claim asserted by. Ms. Addison arises out of or relates to “medical, nursing, or other healthcare malpractice.”

9. No claim of Ms. Addison addresses any "departure from accepted standards of medical or health care or safety standards."

10. The only potential relationship - tangential at best - between Ms. Addison's claims and the parameters of the Arbitration Agreement is the relationship of Ms. Addison's claims to Ms. Addison's alleged failure to pay for charges for nursing home or related services. Not only does the Arbitration Agreement specifically exclude such issues, FutureCare has sued Ms. Addison for her alleged failure to pay for charges for nursing home or related services.

11. While Ms. Addison's counterclaim does address factual aspects of her health care to provide context to her counterclaims, her claims do not fall within the parameters of the Arbitration Agreement

12. The Motion to Compel Arbitration is without merit, is filed in bad faith, and is intended solely to delay this matter and to increase Ms. Addison's costs.

STANDARD OF REVIEW

Arbitration may not be compelled if a valid arbitration agreement mandating arbitration of the dispute in question does not exist. Accordingly, the question presented to the Court in a petition to compel or stay arbitration under MD. Code Ann., C & Jud. Pro. § 3-207 or § 3-208 is whether a valid agreement to arbitrate *the dispte at issue* exists. *Stauffer Constr. Co. v. Board of Educ,* 54 Md. App. 658,460 A.2d 609 (1983), *cert denied,* 297 Md. 108 (1983). Both the United States Supreme Court and the Maryland Court of Appeals have held that arbitration cannot be compelled without an arbitration agreement covering the subject matter of the dispute. *See, Moses H. Cone Me Hosp. v. Mercury Const.,* 460 U.S. 1, 19-20 (1983); see also *Cheek v. United Healthcare of the Mid-Atlantic, Inc.,* 378 Md. 139, 835 A.2d 656 (2003), quoting *Curtis Testerman Co. v. Buck,* 340 Md. 569, 579, 667 A.2d 649 (1995)("a party cannot be required to submit any dispute to arbitration that it has not agreed to submit."); *E.E.O.C v. Waffle House, Inc.,* 534 U.S. 279, 289 (2002) ("nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement" to arbitrate.) *Monk v. Purdue Farms Inc.,* 12 F. Supp. 2d 508, 509 (D. Md. 1998) (a 'party cannot be required to submit to arbitration any dispute which he has not agreed to so submit" *see also Peopls Sec. Lfe Ins. Co. v. Monumental Lf s. Co.,* 867 F.2d 809, 812 (4th Cir.1989) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.")

An arbitration agreement does not exist, and arbitration cannot be compelled, if the agreement at issue is susceptible to traditional contract defenses. As stated by the Court of Appeals:
"Whether a valid arbitration agreement exists in the case subj judice 'depends on contract principlees since arbitration is a matter of contract' The United States Supreme Court has stated that 'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements..."'

Walther v. Sovereign Bank, 386 Md. 412, 425-26, 872 A.2d 735 (2005); *see also Holloman v. Circuit City Stores, Inc.,* 391 Md. 580, 590, 894 A.2d 547 (2006) ("the issue of whether an agreement to arbitrate exists is governed by contract principles"); *Doyle v. Fin. Am.,* LLC, 173 Md. App. 370,918 A.2d 1266,1269 (2007).

In the present case, under the standards enunciated above, no agreement to arbit-ate the dispute in this case exists. First, the agreement relied on by FutureCare does not cover the present dispute by its own terms. Second, the agreement relied on by FutureCare is void due to its unconscionability, the fraud inherent in its execution, and the du- ress under which the agreement was signed. Third, FutureCare's petition requests this Court to exercise its equitable powers, and FutureCare's unclean hands prevent it from being entitled to seek equity.

ARGUMENT

The assertion by FutureCare that the Arbitration Agreement mandates that the claims of Addison are required to be submitted to Arbitration is, at best, disingenuous. The subject matters addressed by the Arbitration Agreement - the agreement drafted by FutureCare - are identified in simple English:
"It is understood and agreed by *FutureCare Lochean* (the 'Facility') and *Beulah Addison* ('Resident' or 'Resident's authorized representatives' hereinafter collectively the 'Resident') that any legal disputes, controversies, demands or claims (hereinafter collectively referred to as 'claim or claims') ***that arise out of or relate to any safety issues, professional service or health care provided by the facility, it agents, servants and/or employees*** to the Resident

This agreement to arbitrate includes, but is not limited to, ***any claims for medical, nursing, or other health care malpractice*** rendered to the Resident by the Facility or any of its agents, servants and/or employees, including, but not limited to claims for fraud, misrepresentation negligence, gross negligence, malpractice, ***or any other claims based on any departure from accepted standards of medical or health care or safety standards,*** whether sounding in tort, contact or otherwise." [emphasis added]

The only potential relationship - tangential at best - between Addison's claims and the parameters of the Arbitration Agreement is the relationship of Addison's claims to Addison's alleged failure to pay for charges for nursing home or related services. Not only does the Arbitration Agreement specifically exclude such issues, FutureCare has sued Addison for her alleged failure to pay for charges for nursing home or related services. The anthor of FutureCare's position is that it may sue a resident for failure to pay but the resident may not raise any defense to his or her failure to pay. If the Court were to accept such a position, it would be open season on every **elderly** resident of any disreputable nursing facility. FutureCare's position is that its **elderly** patients may be sued for nonpayment but may not offer any defense in such a suit. FutureCare's position is absurd.

1. No Agreement to Arbitrate the Claims Raised In This Case Exists for Either Party.

Arbitration may not be compelled in the absence of an agreement to arbitrate. The arbitration agreement relied on by FutureCare narrowly defines the disputes subject to arbitration, the disputes raised in this case do not fall within the scope of the agreement, and arbitration of the disputes in this case may not, therefore, be compelled.

a. The Narrow Arbitration Clause Raised By FutureCare Applies Only To Disputes Concerning Safety Issues Professional Services Or Health Care Provided By FutureCare

FutureCare's arbitration agreement is narrowly drafted, and must be narrowly ap plied. An arbitration clause is narrow if it "does not provide that all disputes are to be referred to arbitration" but rather specifies disputes which may be laken to arbitration. *Mayor and City Council of Baltimore v. Baltimore City Composting,* 800 F. Supp. 305, 308 (D. Md.1992). "Where a narrow, rather than a broad, arbitration clause is involved, courts generally scrutinize the contract more closely to determine whether the parties intended that a particular clispute be arbitrated." *Id., citing, e.g., McDonnell Douglas Fin. v. Pennsylvania Power & Light Co.,* 858 F2d 825,832 (2d Cir.1988).

Here, the arbitration clause relied on by FutureCare is narrow, not broad, and must therefore be closely scrutinized to determine whether the disputes in this case fall under the narrow range of disputes covered by the clause. It states its narrow application three times in the text of the agreement. (*See* Exhibit B to FutureCare's Motion). First, the agreement states that it covers disputes, "...that arise out of, or relate to any safety issues, professional service or health care provided by the facility, it agents, servants and/or employees..." *Id.* at Introductory Paragraph *[emphasis added].*

This clause clearly limits the application of the arbitration agreement to the narrow class of disputes involving the safety, health, and professional services to which Ms. Addison was contracting from FutureCare. The limits of the arbitration do not include

the **financial** scams undertaken by FutureCare and its agents once Ms. Addison had been "marked" as a client with deep pockets and mental issues resulting from her age and stroke.

Next, the agreement states:

I. Application of Agreement

This agreement to arbitrate includes, but is not limited to, any claims for medical, nursing, or other health care malpractice rendered to the Resident by the Facility or any of its agents, servants and/or employees, including, but not limited to claims for fraud, misrepresentation, negligence, gross negligence, malpractice, or any other claims based on any departure from accepted standards of medical or health care or safety standards, whether sounding in tort, contract or otherwise.

Id. at Page 1 [emphasis added].

Again, these terms of the agreement limit its application to disputes arising from safety, healthcare, and professional malpractice claims, and not to anything involving Ms. Addison's counterclaims evolving from tortious and fraudulent conduct completely extraneous to the safety, healthcare, and professional services once offered by FutureCare to Ms. Addison.

Arguably, there is some ambiguity in this portion of the agreement as to whether the arbitration agreement relates to only disputes regarding professional services gener- ally. However, the arbitration agreement is a contract of adhesion, "presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Walther v. Sovereign Bank,* 386 Md. 412, 430, 872 A.2d 735 (2005). That means the Court must "construe ambiguities against the draftsman." Id.Construing the ambiguity in agreement against the draftsman, FutureCare, requires finding that the arbitration agreement covers only a narrow class of disputes involving the safety, health, and professional services.

Indeed, the final statement in the agreement of its scope compels the conclusion that the arbitration agreement applies only to the narrow class of disputes relating to the safety, health, and professional services, and not to anything else. At Section VII, the agreement states, "All claims based in whole or in part on the same incident, transaction, or related course of the care or service provided by the facility to the resident...." (Exhibit B to FutureCare's Motion) *(emphasis added).*

This paragraph clearly and unambiguously limits the application of the arbitration agreement to disputes arising from the "course of the care" contracted to be provided to Ms. Addison. Any possible ambiguity regarding the scop .of disputes created by the agreement must be construed against FutureCare, and thus against expanding the scope of the contract. *Walther,* 386 Md. at 430. The claims in this case relate to fraud and tort against FutureCare, and arise outside of the scope of the arbitration agreement.

b. The Disputes Raised in This Case Relate to the Foreclosure Rescue Scam Perpetrated Against Ms. Addison, Not to the Safety, Healthcare, and Professional Services Offered by FutureCare to Ms. Addison and May Not be Compelled to Arbitration.

Having determined the scope of the arbitration agreement as applying to disputes arising from safety, healthcare, and professional malpractice claims, the next step in the inquiry is to determine what issues are in dispute in this case. A brief look at the Counterclaims shows that the disputes at issue in this case do not arise from issues of safety, healthcare, and professional malpractice claims, and are not therefore subject to compelled arbitration.

None of the claims in Ms. Addison's Counterclaims relate to her safety, healthcare, and professional malpractice claims. The Counterclaims raise seven causes of action concerning FutureCare's duty and care - fiduciary duty - to Ms. Addison for issues not related to her safety, healthcare, and professional services.

The fact that arbitration does not apply to this case is supported by persuasive judicial precedent holding that an arbitration agreement relating to one aspect of a relationship does not apply to torts and common law causes of action arising from a foreclosure rescue scam. *See Henry v. Great Lakes Nat'l Mtg. Co.,* 2006 WL 3378478, slip op. (Ohio App. 8 Dist. Nov. 22, 2006), attached as EXHIBIT 1. Foreclosure rescue scams of the type apparent in this case are only recently coming to light, and cases on point have not yet been litigated through the Maryland appellate courts. However, the Court of Appeals of Ohio considered a case involving a foreclosure rescue scam and an arbitration agreement between the victim and a lender defendant, and concluded that arbitration could not be compelled because the arbitration agreement applied only to documents, and the Plaintiffs claims concerned wrongful conduct outside of those documents. *See Id.*

In *Henry*, a consumer, fearing her home was soon to be foreclosed upon, contacted Great Lakes National Mortgage Co., ("Great Lakes") for assistance. *Id.* at *1. Great Lakes indicated that her home was in foreclosure, and told her that it could help stop the foreclosure. *Id.* An employee of Great Lakes had the consumer execute a quit- claim deed to a third party, and had the consumer's mother take out a home equity line of credit, purportedly to stop the foreclosure. *Id.* In connection with that line of credit, the consumer's mother signed an arbitration agreement which "require[d] arbitration of disputes 'concerning any aspect, part portion or the performance (or the claimed non-performance) of Great Lakes National Mortgage Co. as it pertains to any part of portion of any loan or loan application[.]' *Id.* at 3. Instead of using the money to stop the foreclosure, the Great Lakes employee took the money and invested it in another property. *Id.* The consumer, her mother, and others filed a complaint against Great Lakes, its employee, and other involved parties. *Id.* at 3.

Great Lakes attempted to invoke the arbitration agreement it claimed the con-sumer's mother, one of the plaintiffs, signed in connection with the home equity loan. *Id.* The trial court denied Great Lakes' motion to compel arbitration, Great Lakes appealed, and the Court of Appeals of Ohio affirmed. *Id.* at *1.

The court refused to enforce the arbitration agreement relating to other issues not part of the arbitration agreement in the context of this foreclosure rescue scam. *Id.* It held that "as plaintiffs' claims are independent of the arbitration provision, and instead accuse defendants of extensive wrongful conduct both before and after the signing of this document, the claims are outside the scope of the arbitration provision." *Id.* It stated further,

> [W]hen a matter is clearly independent of and outside the scope of an arbitration agreement, a stay of proceedings pending arbitration is unwarranted...plaintiffs have alleged that defendants engaged in extensive wrongful conduct both before and after the purported signing of the October 14,2004 [arbitration] document. Plaintiffs have alleged various claims including fraud, fraudulent inducement and procedural unconscionability, fraud in the factum, intentional infliction of emotional distress, conversion, in connection with the defendants' claims that [the foreclosure rescue victim's] home was in foreclosure, the misappropriation of those loan proceeds, as well as the alleged "settlement" of that alleged misappropriation, and defendants' alleged failure to "follow through" on the terms of this "settlement" These alleged matters precede and subsume the October 14, 2004 purported transaction. We therefore conclude that these claims arise from defendants' alleged wrongful conduct which is clearly independent of and outside the scope of the October 14, 2004 arbitration provision pur-portedly signed by [the victim's mother]. Accordingly, this matter is not subject. to arbitration and the trial court properly denied the Great Lakes Defendants' motion for a stay pending binding arbitration.

Id. at *4 [citations omitted].

As in *Henry*, the arbitration agreement raised here by FutureCare is ineffective to compel arbitration of the disputes in this case. Ms. Addison's claims relate to Future- Care's ongoing wrongdoing in a foreclosure rescue scam - not from issues related to Ms. Addison's safety, healthcare, and professional healthcare services. The issue in *Henry* had a peripheral involvement in the foreclosure rescue scam, but it was not the issue itself that was the subject of the litigation, as noted by the Ohio appellate court.

A more telling distinction in this case is that there is no nexus between the services contracted for and the torts alleged. In *Henry*, the lender and victim contracted for moortgage services. The lender used a property **financing** scheme to defraud the victim of property. The nexus in *Henry* is obvious. In this case, Ms. Addison contracted for health care and nursing home care. There is no nexus between the contract for health care and the alleged fraud except that the victim unwittingly subjected herself to **exploitation** by FutureCare and its agents.

For these reasons, the Court should not compel arbitration and deprive Ms. Addison of her day in court to fight the scam intentionally perpetrated by FutureCare.

2. FutureCare's Arbitration Agreement is Void as Unconscionable and as Induced by Fraud and Duress, Even If It Applies to the Disputes Raised in this Case.

The arbitration agreement raised by FutureCare fails not only because it does not cover the current disputes, but also because it is unconscionable, was induced by fraud, and was signed under duress. As noted above, unconscionability, duress, and fraudulent inducement are all grounds to invalidate an arbitration agreement in Maryland. *See Walther v. Sovereign Bank*, 386 Md. 412, 425-26, 872 A.2d 735 (2005). Accordingly, the arbitration agreement raised by FutureCare is invalid and arbitration in this case should not be .compelled.

a. FutureCare's Arbitration Agreement Is Unconscionable and Void.

FutureCare's arbitration agreement is unconscionable. The circumstances surrounding the signing of the agreement, the adhesion nature of the agreement, the fees and charges that Ms. Addison would be required to pay in order to have the present case heard before the arbitrator, all support this conclusion. As the agreement is unconscionable, it is void and unenforceable. See Walther, 386 Md. at 425-26.

A contract is unconscionable if the circumstances of the signing of the contract and the substance of the contract are unfair. The Commentary to Article 2 of the Maryland UCC states:

> The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract...The principle is one of the prevention of oppression and unfair surprise....

Md. Code Ann., Com. Law § 2-102, commentary &1.

"Unconscionability" has two components: procedural unconscionability and sub-stantive unconscionability. See Doyle v. **Finance** America, LLC, 173 Md. App. 370, 918 A.2d 1266, 1274 (2007). As succinctly stated by the Court of Special Appeals:

> Procedural unconscionability concerns deceptive practices employed at the bargaining table. Thus, procedural unconscionability looks to how the agreement was reached. It relates to the individualized circumstances surrounding each contracting party at the time of contracting. Substantive unconscionability concerns the actual terms of the contract.

Id. at 1274, *citing Holloman v. Circuit City Stores*, Inc., 391 Md. 580, 603, 894 A.2d 547 (2006).

In the present case, the FutureCare used deceptive and unconscionable practices against Ms. Addison, a recent victim of a stroke, when FutureCare had her sign the Arbitration Agreement The actual terms of the arbitration agreement are unconscionable as well.

i. The Arbitration Agreement is Procedurally Unconscionable.

FutureCare's arbitration agreement is procedurally unconscionable. *In Doyle*, the Court of Special Appeals indicated how procedural unconscionability could be detected:
Certain elements of the bargaining process tend to indicate the presence of procedural unsconscionability: "overwhelming bargaining strength or use of fine print or incomprehensible legalese may reflect procedural unfairness in that it takes advantage of or surprises the victim of the clause." 8 Richard A. Lord, Williston on Contracts, '18:10 (4th ed. 1999). Additional factors include, but are not limited to: "Age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract" That the arbitration agreement was presented as an adhesion contract is also significant.

918 A. 2d at 1274 [citations omitted].

Indeed; the simple presence of an adhesion contract, as is present in this case, is a strong indicator of procedural unconscionability. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003), *quoting Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 784 (9th Cir. 2002) (In adhesion contracts, "oppression and, therefore, procedural unconscionability, are present"); *see also Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100, 118 Cal. Rptr. 2d 862, 867 (2002); Circuit City Stores, *Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) ("The [arbitration agreement] is procedurally unconscionable because it is a contract of adhesion."); *Flores v. Transamerica Home- First, Inc.*, 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376, 382 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability") *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1168 (N.D. Cal. 2002).

Here, the circumstances show many indicators of procedural unconscionability, beyond, but including, the use of an adhesion contract. "A contract of adhesion, it is well settled, is one, usually prepared in printed form, "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 602, 894 A.2d 547 (2006). Here, FutureCare's agreement was presented to Ms. Addison immediately after her recent stroke, on a "take it or leave it" basis, when "leav- ing it" was not an option since she no longer was able to care for herself. FutureCare clearly had overwhelming bargaining strength when it presented this contract to her, and Ms. Addision lacked any meaningful choice about signing it.

Ms. Addision is **elderly**, lives in poverty, is not sophisticated, is in poor health, lacks business acumen or experience, and was in dire straits when she came to Future- Care. In her mind, at the time of her admission to FutureCare, Ms. Addision had no other choice but to do what she was told - if she even understood what she was signing or even being told by FutureCare. Ms. Addison had no time to review any of the documents.

Neither FutureCare, nor anyone else, explained the arbitration agreement and its purported waiver of her constitutional rights to her. A copy of the arbitration agreement was not provided to Ms. Addison or her representatives or attorneys until the Motion to Compel was filed with the Court, despite numerous demands for copies of these documents in the last twelve months. She had no choice about signing the arbitration agreement or any other document that day of her admission to FutureCare - it was either sign the agreement or be on the street. All of these factors lend support to the conclusion that the execution of the arbitration agreement was procedurally unconscionable.

Maryland courts have indicated that situations similar to Ms. Addison's indicate procedural unconscionability. See Doyle, 918 A.2d at 1275. In Doyle, the Court of Special Appeals considered the question of "whether it is procedurally unconscionable for a mortgagee to approve a loan and wait until the day of closing to present the mortgagor with an arbitration agreement that must be signed, in order that the loan proceeds be disbursed." *Id.* The court concluded, "such conduct, at least, approaches procedural

unconscionability." *Id.* Doyle concerned a class action case where mortgagors were suing to recover statutory damages for the failure of a mortgage company, in an otherwise regular mortgage transaction, to disburse the loans on the day of closing. *Id.* at 1269. If the circumstances of Doyle, which involved seemingly technical violations of the law in otherwise normal mortgage transactions, were sufficient to "approach" procedural uncon- scionablity, then certainly the circumstances of this case clearly more than satisfy a showing of procedural unconscionability.

ii. The Arbitration Agreement is Substantively Unconscionable.

The terms of FutureCare's arbitration agreement, concerning the payment of fees and costs and confidentiality, are unconscionable. Accordingly, the agreement is substantively unconscionable as well as procedurally unconscionable. *See Doyle, 918 A. 2d at 1274, citing Holloman,* 391 Md. at 603 ("Substantive unconscionability concerns the actual terms of the contract.")

An arbitration agreement may be found unconscionable on the basis of "prohibitive" fees and costs that would or could prevent a litigant "from effectively pursuing her claims in an arbitral forum." Doyle, 918 A.2d at 1277, quoting Green Tree Fin. Corp.-*Alabama v. Rudolph,* 531 U.S. 79, 90-91 (2000). The Court of Appeals has indicated that an arbitration agreement may be substantively unconscionable if the fees arising from arbitration are "unduly burdensome." *See Walther v. Sovereign Bank,* 386 Md. 412, 422, 872 A.2d 735 (2005) (concluding that arbitration clause was not substantively unconscionable "because petitioners [did] not show them to be unuly burdensome.") Here, the fees and costs to which Ms. Addison would be subject would be absolutely prohibitive, would prevent her from accessing justice, and would be so unduly burdensome as to be grossly unconscionable. The fees would utterly preclude her from pursuing any claims in arbitration.

As mentioned above, the agreement upon which FutureCare bases its Motion purports to require Ms. Addison to pay all of FutureCare's attorney fees for arbitration. This would add thousands more dollars to Ms. Addison's arbitration costs, and would add the perverse incentive for FutureCare to intentionally engage in frivolous and unwarranted filings in order to drive up Ms. Addison's costs even higher.

b. FurtureCare's Arbitration Agreement Was Induced Under Duress and Is Unenforceable and is Void.

FutureCare obtained Ms. Addison's signature on its arbitration agreement through the use of duress - at a time when it is questionable whether or not she had the capacity to even make the agreement - and the arbitration agreement is therefore unenforceable and void. "Duress which permits avoidance of a contract consists of the use of coercion, the victim's loss of the ability to act independently and the entry by the victim into the contract." *Young v. Anne Arundel County,* 146 Md. App. 526, 596, 807 A.2d 651 (2002), quoting *Blum v. Blum,* 59 Md. App. 584, 477 A.2d 289 (1984). The Court of Appeals stated long ago that both artifice and force can constitute duress:

> [T]he element of obligation upon which a contract may be enforced springs primarily from the unrestrained mutual assent of the contracting parties, and where the assent of one to a contract is constrained and involuntary, he will not be held obligated or bound by it. A contract, the execution of which is induced by fraud, is void, and a stronger character cannot reasonably be assigned to one, the execution of which is obtained by duress. Artifice and force differ only as modes of obtaining the assent of a contracting party, and a contract to which one assent through imposition or overpowering intimidation, will be declared void, on an appeal to either a court of law or equity to enforce it. The question, whether one executes a contract or deed with a mind and will sufficiently free to make the act binding, is often difficult to determine, but for that purpose *a court of equity, unrestrained by the more technical rules which govern courts of law in that respect will consider all the circumstances from which rational inferences may be drawn, and will refuse its aid against one who, although apparently acting voluntarily, yet, in fact, appears to have executed a contract, with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will.*

Central Bank v. Copeland, 18 Md. 305, 317-18, 1862 WL 1558 (Md.) (1862) [emphasis supplied]. This Court, in determining the existence of a valid arbitration agreement, acts as a court of equity, not law. Md. Code Ann CTs. & Jud. PROC. § 3-201(b)(defining a "court" under the Maryland arbitration act as "a court of equity.")

Duress may be applied by another party to the contract, or a third party

> If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Young, 146 Md. App. at 597, *quoting* Restatement (Second) of Contracts § 175 (1981).

Here, the duress placed upon Ms. Addison to sign the arbitration agreement was imposed by FutureCare at a time immediately after she had a stroke and mostly likely did not understand what she was signing and if she did she did so because she had no place else to turn.

CONCLUSION

For the reasons stated above, Addison respectfully requests this Court DENY FutureCare's Motion and grant such other and further relief as the nature of this case may require.

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